No. 149

In the Supreme Court of the United States

October Term, 1956

JOHN C. WEBB AND HELEN H. WEBB, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

JOHN C. WEBB

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ARGUMENT

The respondent again declines to recognize and harmonize in any degree the "newly discovered evidence" set forth by the petitioners as did also the Trial Court and the Court of Appeals. (Pet. 29-30 and 18-19). The Trial Court, as did the Government, erroneously stated that the "new evidence" was the deed for a certain sale of Hurley Farm (the less contestable) to Custaris, Inc., to Cattle

crine Wahler for $270,000, recorded on 1 April, 1957. At no time have the petitioners claimed that this straw sale was anything more than a fulcrum indicating the existance of certain records and permitting the profitable subpoena of certain named individuals and those records (R 54-55). The straw sale indicates the existence of income tax returns that will show a sale at no profit to Wahler (confirming purchase in 1955 at $270,000) and the corresponding existence of stockholders lists. At the time of trial, it was assumed by petitioners that a competent lawyer, such as is C. Leo DeOrsey, would not deny testimony to the petitioners concerning company actions and ownership unless such actions and ownership could be and, in fact were, hidden from legal measures for discovery that could be taken by petitioners. The Government gave this evaluation as its continuing belief in argument before the Court of Appeals.

The past actions of the petitioners can be compared with that of the Government in the prosecution of Al Capone. Public knowledge of unlawful actions by Capone never resulted in successful prosecution. He was finally prosecuted on the basis of fraudulent income tax returns following the examination of existing records and the reconstruction of his probable earnings.

The Court of Appeals authorized the Trial Court (264 F 2nd 888, R 3 & 4), on March 11, 1959, to hear the motion of the petitioners for relief from final judgment. The Court said, in part, "leave is hereby granted the District Court to consider and dispose of the motion for a new trial now pending before it, and to have such other proceedings as the Court may deem appropriate." The Clerk of the District Court and the clerk and law clerk of the trial judge stated, prior to the first hearing on the motion, that the issuance of subpoenae listed in the motion would be made

by the trial judge if he felt confirmation of the statements by the petitioners was required. The trial judge did not issue the subpoenae needed to establish the new evidence that was required if he questioned the integrity or knowledge of the petitioners. Further, despite motions and arguments before him, he continually ignored the nature and probable effect of the new evidence (which in other courts has won reversal). Just so has the Government ignored the nature and effect of the "newly discovered evidence" in a new trial. The failure of the trial judge to read, hear, understand and rationalize in any manner on the new evidence, evidenced by his order, is clearly an abuse of discretion.

The Government confirms that the judge erroneously selected March 1, 1957, as the date of recording the deed for the straw sale of Hadley Farm by Custards, Inc., which recordation actually occurred on April 1, 1957. The Government fails to discuss what effect the use of April 1 would have upon the reasoning of the trial judge. Would he agree that it was reasonable diligence on the part of petitioners to search the land records and be ready for trial on the scheduled date of March 27, 1957, and thereafter to follow changes by the maintenance of liaison with the owners of the property? Would he hold that with each postponement of trial by the Government, the petitioners should have complete repreparation of their case with the attending skyrocketing of expense? Such delays and added expense would not be in accord with the stated objects of the Federal Rules for Civil and Criminal procedures (Fed R Civ P 1) which were to "reduce the uncertainty, delay, expense and the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits." The failure to recognize that the recordation date of April 1, 1957, has different legal implications from the date of March 1,

1957, which he used in error and which error was successively brought to his attention in the hearings and in a motion subsequent to his order and finding, is clearly an abuse of discretion on the part of the trial judge.

The Government claims that there is nothing so unusual or extraordinary as to bring the petitioners under the provisions of 60(b)(6), "any other reason justifying relief." The petitioners have claimed that justice was defeated by the inadequate quality of legal representation of legal counsel and by the "monstrous" nature of the judgment.

Attention of the Court is again invited to the published hearings leading to the enactment of the Federal Rules for Civil and Criminal Procedure. Mr. Cummings stated before the House Judiciary Committee on March 1, 1938, that the procedures were devised "in such fashion that even a mind of moderate capacity would easily understand what the required course would be." The hearings before and the published report of the Senate Judiciary Committee show that the sole opposition to the new procedure was that there existed a vested interest of the local bar in litigation originating in and procedures peculiar to its area. Such opposition bore no subsequent result in modification of the bill. The intent of Congress, in passing the new rules, is defeated through the inadequacies of performance of bench and bar which performance is the province of and is within the capacity of leadership inherent in the Supreme Court of the United States. As a result of such inadequacies of performance, in the opinion of leaders of the bar, litigation is diverted through the establishment, by Congress and others, of judicial functions in administrative or other bodies. The bar has become a "distressed" profession, through declining per capita expenditures for legal services, as compared with those for services of other professions and trades as measured by the

American Bar Foundation in its study of Distribution of Income of Lawyers in the United States for 1958. Current measures to correct delay in litigation include pre-trial and the forcing of arbitration by counsel for lifigants in certain courts of Pennsylvania, as reported in The Readers' Digest for April, 1960. Performance of the judiciary within various Federal Courts leaves much to be desired as reported to the Senate Appropriation Committee, in a Field Study of the Operations of United States Courts in April, 1959. It has been shown by petitioners that the trial judge evaded responsibility when he was requested to determine the adequacy of performance of counsel for the petitioners, as members of his court, to which inadequacy of performance he was informed that he contributed through the fear which he generated and which, according to the local judiciary, was not unique to this case or counsel. The petitioners have consistently claimed, in proper person, that the inadequacies of performance of counsel have deprived them of justice that can pretend to objectivity. Petitioners hold that improvement in quality of performance by the bar and the bench would be enhanced in this instance by the granting of certiorari on (a) (b) (6) alone. Such objective would be within the spirit of the statute enacted and in keeping with the responsibilities assigned by statute to this Court. Such improvement would be of benefit to the public and to the bar and bench.

As to the "monstrous" nature of the judgment, the dimensions were determined after the motion for new trial was effected under new counsel under emergency conditions during December, 1957. The award to the Webbs (as divided between damages on the one hand and fee simple and easement valuations on the other by the Government appraisers) was at the rate of about $200 an acre. The purchase by negotiation of adjecent land by

PEPCO, in 1956, at values between $550 an acre and $1,000 were not recorded until late August, 1957. As previously commented on, trial preparation including the search of land records by the litigants had been completed by March 20, 1957. Incidentally, PEPCO has refused to state, out of court, what proportion of their purchase prices could be assigned as damages.

The petitioners point out that the importance of the issues involved in land taking aspects alone are far greater than the cursory treatment awarded them by trial judge, Court of Appeals and Government. Land takings such as these, must increase at a geometric rather than arithmetic rate as population increases and as farm lands are progressively pre-empted by eminent domain and values become fluid (as in Montgomery County) rather than static.

CONCLUSION

For the reasons set out above and for those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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